Supreme Court, U.S.
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No. 04-1073

IN THE
SUPREME COURT OF THE UNITED STATES

EL AMIN BASHIR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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Pursuant to Rule 15.8, the Petitioner files this supplemental brief to call the Court's attention to a new decision of the United States Court of Appeals for the Eleventh Circuit, which may affect the Court's consideration of the Petition for Writ of Certiorari in this case. In *United States v. Dockery*, ___ F.3d ___, 2005 W.L. 487735 (11th Cir. March 3, 2005), on remand from this Court in light of *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), the court of appeals refused to reconsider its prior holding that Mr. Dockery had abandoned a sentencing issue by not raising it in his initial appellate brief.

The court of appeals held that it would not revisit the *Booker* claim because this Court's remand order did not specifically require the court of appeals to consider the issue notwithstanding its absence from Mr. Dockery's initial brief.

The Eleventh Circuit then adhered to its rule that deems abandoned contentions not raised in an initial brief to preclude Mr. Dockery from asserting a *Booker* claim. *Dockery*, ___ F.3d at ___, 2005 W.L. 487735, *1, *quoting, United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) ("In the absence of any requirement to the contrary in either *Apprendi [v. New Jersey*, 530 U.S. 466 (2000),] or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.") and *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) (*Apprendi* issue deemed abandoned where not raised in initial brief).

The United States takes the position in this case that the Court should grant certiorari, vacate the judgment below and remand the case for further consideration in light of *Booker*. *Dockery*, however, makes evident that the disposition suggested by the government would result in no review of the *Booker* issue whatsoever by the Eleventh Circuit, in this and other cases arising from that court under the same circumstances. These circumstances exist where established decisional law changes during the pendency of appeal, so that the new decision must be applied under *Griffith v. Kentucky*, 579 U.S. 314, 321-23 (1987), but the Eleventh Circuit forecloses review because the new decision was rendered after the filing of initial briefs that did not predict the decision. Given the Eleventh Circuit's decision in *Dockery*, the relief requested in the petition – that this Court either (1) grant certiorari and review the merits of the Eleventh Circuit's waiver or abandonment rule, or (2) grant certiorari, vacate the judgment of the Court of Appeals and remand with directions for further remand to the district court for resentencing – remains the appropriate disposition of the petition in this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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